24

Office - Supreme Court, U. S.
FILED
SEP 28 1912
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 105.

DUQUESNE CLUB, *Petitioner*,

against

HENRY D. BELL, as Former Acting Collector of Internal Revenue.

No. 106.

DUQUESNE CLUB, *Petitioner*,

against

WILLIAM D. DRISCOLL, as Collector of Internal Revenue.

REPLY BRIEF.

DUQUESNE CLUB,

By GEORGE B. FURMAN,
1316 L Street, N. W.,
Washington, D. C.

PAUL ARMITAGE,
EDWARD HOLLOWAY,
New York, N. Y.,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

No. 105.

DUQUESNE CLUB, *Petitioner,*

against

HENRY D. BELL, as Former Acting Collector of Internal Revenue.

No. 106.

DUQUESNE CLUB, *Petitioner,*

against

WILLIAM D. DRISCOLL, as Collector of Internal Revenue.

REPLY BRIEF.

Respondent's Counsel in his brief misstates the question presented on this application.

The Trial Court found:

> "The primary and predominant purpose of the Duquesne Club is a business club and any social features are incidental to this predominate purpose, and are not material to its operation or existence." (R. 299)

And also found that:

> "The business and professional men have come to look upon the club as a place in which to meet competitors and their business associates and it is largely used for that purpose during the luncheon period." (R. 294)

Respondent's Counsel asserts:

> "The predominant purpose of the Duquesne Club is plainly social (p. 7) * * * There is no proof that the social aspects of the lunches and other activities * * * were only incidental features" (p. 8) * * * and that "each case necessarily turns on its own particular facts." (p. 9)

These assertions completely ignore the Findings of the Trial Court adopted by the Circuit Court of Appeals, that:

> "The primary and predominant purpose of the Duquesne Club is a business club, and any social features are incidental to this predominate purpose, and are not material to its operation or existence." (R. 299)

With the finding of a fact fully supported by the evidence and adopted by the Circuit Court of Appeals, there was no question of fact presented or decided by the Circuit Court, and certainly not the fact asserted by Respondent's Counsel, but the contrary. What the Trial Court held was, that a business luncheon club whose primary and predominant purpose was a place where its business and professional members could meet "competitors and their business associates" (R. 294) with social features not material to this purpose and use, was a nonsocial club within the statute and not taxable.

The Circuit Court of Appeals intended to and did enunciate a new rule of law. It gave an enlarged and strange meaning to the word *social* in the Act. It intended to overrule the uniform line of cases of the other Circuits holding that a luncheon club maintained by business men for that purpose with social features, merely incidental and not material, was not taxable. That it intended so to do is shown, not only by its plain words but by its express overruling of the *Union Club* case, 99 F. (2nd) 259 (C. C. A. 3 1938) (R. 330) in which that Court had laid down a contrary rule of law and held that a club maintained by busi-

ness men for business luncheons was not social and not taxable under the Act.

That the Commissioner of Internal Revenue asserts that the Circuit Court of Appeals has enunciated a new rule of law is shown by the fact that he is seeking to reopen and tax under this case, all of the old cases wherein the Courts have decided that a business men's luncheon club maintained by business men to further their business interests, were non-taxable.

Petitioner's Counsel has received numerous requests for the record and decision in this case from attorneys and representatives of other Clubs formerly held non-taxable as business luncheon clubs, because the Treasury Department is now claiming that this decisive blow overrules all of the prior decisions in those club cases and requires a reopening of the same and a different principle of law applied thereto.

These facts not only show how the decision in this case is being construed by the Commissioner of Internal Revenue as one of law but also supports the point in our main brief (pp. 16, 17) that this decision has rendered the law "confused, uncertain and doubtful." Unless this Court determines this conflict the law will be left confused and indefinite, and a mass of litigation will result, because the cases are in other than the Third Circuit, and the Courts in those Circuits will follow their own decisions and not the Third Circuit, in conflict.

Respondent's Counsel in his brief seeks to avoid this direct conflict on a question of law and the construction of a Federal Statute between the Circuit Court's decision in this case and its prior decision in the *Union Club* case (supra) and the long line of decisions and the Regulations to the contrary, by asserting that each case necessarily turns on its own particular facts and that all that was presented and decided here was a question of fact, i.e., was the Club social or business? (Resp. brief p. 9.)

The Circuit Court of Appeals below specifically adopted these findings of fact (R. 289-299) but placed upon the term *social* in the Statute a new and artificial meaning, contrary

to its usual signification, saying that it was a "term of art even though an elusive one" (R. 327) and held as a matter of law that:

> "An organization, whether incorporated or not, which provides an opportunity for its members to meet each other at mealtimes and partake together of food and drink with conversation on whatever subject pleases them is a social organization" (R. 330).

This is not a finding of fact but a construction of the law, and holds that in spite of the facts found, that the predominating purpose of the Club is "business" (R. 294) and that the social features are not material to its existence, (R. 295) the Club being a business luncheon club is, *by law*, taxable. This is contrary to the Regulations, a long line of Circuit Court of Appeal decisions (see our main brief pp. 11-18) and to the Circuit Court's own decision in the *Union Club* case, *supra*, which it expressly overrules (see our main brief pp. 10-11). If it be a mere question of fact in each case, whether the Club is business or social—how could the Court overrule the *Union Club* case, *supra*,—a different Club?

Respondent's Counsel, in an endeavor to confuse the issue and create an illusion that the case involves merely a fact question, directed his argument to the activities of the Club and the comparison between activities there and the activities of other clubs. He fails entirely to meet the decision of the Circuit Court of Appeals which holds that any luncheon club is a social organization, which is in direct conflict with its prior decisions, and the decisions of the Circuit Court of Appeals of the Second and First Circuits (*Tidwell* v. *Anderson*, 72 F. (2d) 684, C. C. A. 2 and *Squantum Association* v. *Page*, 77 F. (2d) 918 C. C. A. 1) which held that a luncheon club could be a business club and therefore exempt.

WHEREFORE, your Petitioner's prayer for a Writ of Certiorari should be granted.

DUQUESNE CLUB,

By GEORGE B. FURMAN,
1316 L Street, N. W.,
Washington, D. C.

PAUL ARMITAGE,
EDWARD HOLLOWAY,
New York, N. Y.,

Counsel for Petitioner.

Office - Supreme Court, U. S.
FILED
NOV 4
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 105.

DUQUESNE CLUB, *Petitioner*,

against

HENRY D. BELL as Former Acting Collector of Internal Revenue.

No. 106.

DUQUESNE CLUB, *Petitioner*,

against

WILLIAM D. DRISCOLL, as Collector of Internal Revenue.

PETITION FOR RECONSIDERATION of the PETITION FOR WRIT OF CERTIORARI.

DUQUESNE CLUB,

By GEORGE B. FURMAN,
1316 L St., N. W.,
Washington, D. C.

PAUL ARMITAGE,
EDWARD HOLLOWAY,
New York, N. Y.

Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

No. 105.

DUQUESNE CLUB, *Petitioner,*

against

HENRY D. BELL as Former Acting Collector of Internal Revenue.

No. 106.

DUQUESNE CLUB, *Petitioner,*

against

WILLIAM D. DRISCOLL, as Collector of Internal Revenue.

PETITION FOR RECONSIDERATION of the PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justices of the United States Supreme Court:

Comes now the above named Petitioner by its Attorneys and prays for reconsideration of its Petition for Writ of Certiorari herein, which was denied October 12, 1942.

QUESTION PRESENTED.

The Circuit Court of Appeals held in the above case that any "organization, whether incorporated or not, which provides an opportunity for its members to meet each other at mealtimes and partake together of food and drink with

conversation on whatever subject pleases them is a social organization" (R. 330), and taxable under Section 501 of the Revenue Act of 1926, as amended by Section 413, Rev. Act 1928.

Clubs are not taxable under the law just because they serve luncheon. The Commissioner's Regulations which have interpreted the above Section of the law since 1918 provides that a Club is not taxable if "its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, Chamber of Commerce, commercial club, trade organization or the like, merely because it has incidental soial features, * * *." (Section 101.25 of Treasury Regulations 43.)

REASONS WHY THIS PETITION FOR RECONSIDERATION OF WRIT OF CERTIORARI SHOULD BE GRANTED.

1.—The U. S. Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with eight U. S. District Courts, two U. S. Circuit Courts of Appeals, its own Circuit, and the Court of Claims affecting a substantial proportion of over fifty Club cases that have been litigated. (See Exhibit "A" attached.)

2.—The decision is a novel interpretation of an important Federal question, in a way probably in conflict with applicable decisions of this Court, which results in confusion in the administration of the Revenue Laws which should be clarified and settled by this Court.

3.—A reconsideration of the Petition for Writ of Certiorari is prayed because the Commissioner upon the authority of the decision of the U. S. Court of Ap-

peals for the Third Circuit is in effect reversing the interpretation of the law and the decisions of the Court of Claims and a number of the U. S. District and Circuit Courts of Appeals (see Exhibits B, C, D, E attached, showing typical action by the Commissioner, as a result of this conflicting decision).

4.—Because of the utter confusion caused by the conflict of the decision of the U. S. Court of Appeals for the Third Circuit with itself (see Union Club case, 99 F. (2d) 259 (C. C. A. 3) 1938) (R. 330) and other numerous Courts referred to above (see Ex. A, attached) much litigation will be stimulated, at enormous cost of money and time both to the taxpayer and the Government.

Wherefore, it is earnestly prayed that this Court reconsider the Petition for Writ of Certiorari and grant the same.

Respectfully submitted,

GEORGE B. FURMAN,
1316 L St., N. W.,
Washington, D. C.

PAUL ARMITAGE,
EDWARD HOLLOWAY,
New York, N. Y.

Counsel for Petitioner.

George B. Furman, Counsel for the above named Petitioner, does hereby certify that the foregoing Petition is presented in good faith and not for delay.

GEORGE B. FURMAN,
Counsel for Petitioner.

EXHIBIT "A".

LIST OF LUNCHEON CLUBS HELD BY THE FOLLOWING COURTS TO BE NON-SOCIAL IN CONFLICT WITH U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT.

U. S. District Courts:

City Club of Cleveland, 15 A. F. T. R. 557.
City Club of St. Louis, 24 F. (2d) 743.
Los Angeles City Club, 44 F. (2d) 239.
Squantum Association, 7 F. Supp. 815.
Tidwell v. *Anderson*, 4 F. Supp. 789.
Two Thirty Three Club, 2 F. Supp. 963.
Engineers Club of Phila., 19 A. F. T. R. 1358.
Krug v. *Rasquin* (*Bakers Club*), 21 F. Supp. 866.

U. S. Circuit Courts of Appeals:

Squantum Association, 77 F. (2d) 918 (C. C. A. 1).
Tidwell v. *Anderson*, 72 F .(2d) 684 (C. C. A. 2).
Union Club of Pittsburgh, Pa., 99 F. (2d) 259 (C. C. A. 3).

U. S. Court of Claims:

Aldine Club v. *U. S.*, 65 Ct. Cl. 315.
Builders' Club of Chicago v. *U. S.*, 74 Ct. Cl. 595.
Bankers Club of America Inc. v. *U. S.*, 69 Ct. Cl. 121.
Century Club v. *U. S.*, 12 F. Supp. 617.
Chemists Club v. *U. S.*, 64 Ct. Cl. 156.
The Cordon v. *U. S.*, 71 Ct. Cl. 496.
Cosmos Club v. *U. S.*, 70 Ct. Cl. 366.
Houston Club v. *U. S.*, 74 Ct. Cl. 640.
Washington Club v. *U. S.*, 69 Ct. Cl. 621.
Whitehall Lunch Club v. *U. S.*, 80 Ct. Cl. 350.

EXHIBIT "B".

TREASURY DEPARTMENT

Internal Revenue Service
New York, N. Y.

June 29, 1942

In Reply Refer to

Miscellaneous Tax Special Squads
Room 1003, Chanin Building
122 East 42nd Street
New York, New York

Mr. Robert H. Patchin, Secretary
India House, Incorporated
1 Hanover Square
New York, New York

Sir:

Attached hereto is a report of an examination of the books and records of India House, Incorporated, for the period June 1, 1938 to May 31, 1942, in which the examining officers recommend assessment for failure to collect and pay tax due on initiation fees and dues.

Please be advised that the taxpayers are privileged to protest to or request a conference at the Bureau with regard to the proposed assessment, and that in doing so they should communicate with the Commissioner of Internal Revenue, attention MT:M, Washington, D. C.

Yours very truly,

SAMUEL LITWIN,
Internal Revenue Agent.

Enc.

June 29, 1942

Deputy Commissioner
Miscellaneous Tax Unit
Bureau of Internal Revenue
Washington, D. C.

In Re: India House, Incorporated
1 Hanover Square
New York, New York
Second New York District

Sir:

Pursuant to instructions received from Internal Revenue Agent Samuel Litwin, an examination has been made for the period June 1, 1938 to May 31, 1942, of the books and records of the above named club, to determine liability of its members for tax on dues and initiation fees.

This examination disclosed that for the period under review the club had not collected, and the members had not paid tax on dues and initiation fees as required by the provisions of section 1710(a)(1) and (2) as amended, in the aggregate amount of $40,180.50. A schedule has therefore been prepared and attached hereto (exhibit "A") showing the members' names and addresses, dates of payment and amounts of dues or initiation fees paid, and the tax properly payable thereon. It is recommended that assessment be entered against the individuals listed in the amounts so shown.

* * * * * * * * * *

It is our understanding and contention that a luncheon club is, per se, a social club. The bringing together of a rigidly restricted membership in quarters maintained by them for the purpose of congregating for social intercourse would seem to bring the organization within the purview of the Code even though the means employed are daily luncheons rather than formal dinners at less frequent periods.

In the instant case there is no contention that the daily luncheons are subordinate and merely incidental to a different and predominant purpose. While the membership body is composed of business and professional men, there is no record of its having been addressed by speakers on the subjects of business or foreign commerce, nor is there maintained a forum for the open discussion of these and other subjects. It would rather appear that the members resort

to the club at mid-day as a relaxation from business in the company of their carefully selected fellows. Social contacts and intercourse are the desired ends; the luncheons are the means to those ends. This being so, we believe that India House, Incorporated, falls well within the scope of the decision of the United States Circuit Court of Appeals for the Third District, in the case of the Duquesne Club.

It is therefore recommended that assessment be entered under the provisions of section 1710 of the Internal Revenue Code against the members named and in the amounts set forth in the attached exhibit "A."

* * * * * * * * * *

Because of the large number of individual taxpayers concerned in the proposed assessment as shown in exhibit "A" attached, it is inexpedient to communicate with them severally or to obtain from them their agreements in writing for the assessment recommended. In lieu of such action, there has been submitted to Mr. Robert H. Patchin, secretary of India House, Incorporated, at 1 Hanover Square, New York, New York, a copy of this report together with exhibit "A", showing individual taxpayers and the amounts involved. Mr. Patchin has been advised that the taxpayers are privileged to submit a protest to or request a conference at the Bureau with regard to the proposed assessment, and that in so doing they should communicate with the Commissioner of Internal Revenue, attention MT:M, Washington, D. C.

A copy of this report has also been forwarded by mail to the Collector of Internal Revenue, Second New York District Custom House, New York, New York.

Respectfully,

HARRY P. HIGGINS,
General Deputy Collector.
HARRY N. CRITTENDEN,
General Deputy Collector.

INDIA HOUSE, INCORPORATED

Hanover Square
New York, N. Y.

July 6, 1942.

To the Members of India House:

The Secretary of India House has received a letter from Mr. Samuel Litwin, Internal Revenue Agent in charge of Miscellaneous Tax Special Squads of the Internal Revenue Service of the Treasury Department, whose office is at 122 East 42nd Street, New York City, enclosing a copy of a report made to the Deputy Commissioner of Internal Revenue in charge of the Miscellaneous Tax Unit by two General Deputy Collectors, in which it is recommended that assessments be entered under the provisions of § 1710 of the Internal Revenue Code against the members of India House, Inc. in the amounts set forth in an attached schedule, covering dues paid between June 1, 1938 and May 31, 1942.

§ 1710 of the Code levies a tax of 11 per cent (10% prior to 1941) on the dues and initiation fees paid by members to any social, athletic or sporting club or organization if the dues or membership fees of an active resident annual member exceed a specified amount.

Prior to 1928, India House collected from its members and paid over to the Government a similar tax on dues and initiation fees under a provision of the then law, practically identical with the section of the Code above referred to. But in 1928, the club was successful in obtaining a refund of the sums so paid between July 29, 1924 and June 23, 1928, after satisfying the Commissioner that it was not a social, athletic or sporting club within the meaning of the statute.

Since 1928 there has been no attempt to collect such a tax. The above mentioned report and recommendation that assessments be entered against the members of India House results from a recent ruling of the U. S. Circuit Court for the 3rd Circuit in the case of *Duquesne Club* v. *Bell* (127 F. (2d) 363), in which that Court said:

> "We are prepared to say that an organization, whether incorporated or not, which provides an opportunity for its members to meet each other at mealtimes

and partake together of food and drink with conversation on whatever subject pleases them is a social organization. This assumes, of course, an organization the main purpose of which, as is true here, is not other than to provide such an opportunity."

The report states that India House falls within the scope of this decision. It also states that because of the large number of members concerned in the proposed assessment, it is inexpedient to communicate with them severally or to obtain from them their agreements in writing for the assessment recommended, and in lieu thereof, a copy of the report has been sent to the Secretary of India House.

Mr. Litwin's letter states that any member is privileged to protest to or request a conference at the Bureau with regard to the proposed assessment, and that in so doing he should communicate with the Commissioner of Internal Revenue, attention MT:M, Washington, D. C. We understand that such action should be taken not later than July 9th. The amount involved is relatively small (between $1.00 and $116.00) in the case of any individual and probably would not justify the expense of litigation in the case of any one member, but the total for 805 members is $40,180.50.

In view of the necessity for immediate action, the Executive Committee of India House has arranged to have a member request a conference at Mr. Litwin's office with regard to the proposed assessment, and will provide counsel to represent such member and present the facts.

LEIGH C. PALMER,
Vice-President.

EXHIBIT "C".

THE WALL STREET CLUB

40 Wall Street
New York, N. Y.

July 1, 1942

The Club has been notified by the Treasury Department that the Federal tax on dues is to be collected from members and paid by the Club to the Collector of Internal Revenue. As you know, the Board of Governors has consistently taken the position that your Club is a business, not a social club, within the meaning of the statute, and that the dues are, therefore, exempt from Federal tax. However, the United States Circuit Court of Appeals for the Third Circuit has recently held that the Duquesne Club of Pittsburgh is a social club and that its members are subject to the dues tax. We are advised by counsel for the Duquesne Club that a petition will be filed with the United States Supreme Court to review the Circuit Court decision.

In view of the demand from the Treasury Department, the Board is advised by counsel that members should pay the 11% tax on dues, which appears on this bill. Payment of tax will be made under protest, or the amount thereof held pending consultation and decision by the tax authorities.

The Board of Governors is now taking advice of counsel as to the action which should be taken to establish, if possible, tax exemption for your Club. If the tax is refunded, repayment will be made to the members. The amount of any tax finally paid, is, of course, deductible from the gross income of the individual.

EXHIBIT "D."

DOWN TOWN ASSOCIATION
60 Pine Street, New York

June 25, 1942.

To the Members:

The United States Bureau of Internal Revenue has just advised the Club that in view of the recent decision concerning the Duquesne Club of Pittsburgh, the dues and initiation fees payable by members are subject to the 11 per cent tax under United States Internal Revenue Code, Section 1710.

The Club is taking steps to contest this tax; however, in view of the above ruling we are obliged, pending the decision of the matter, to collect the tax on dues payable on or after May 1, 1942, and on initiation fees.

EXHIBIT "E".

THE BANKERS CLUB OF AMERICA
38th, 39th and 40th Floors, Equitable Building
120 Broadway—New York, N. Y.

NOTICE TO MEMBERS

As a result of a decision of the United States Circuit Court of Appeals for the Third Circuit holding that the Duquesne Club is a social one, the Treasury Department has notified us that a tax of 11% will be imposed on the dues of members of our club and of similar luncheon clubs. For this reason we are obliged to include the charge on the attached statement for dues from July 1.

We shall, of course, make objections to the payment of this tax.